

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

D.M., a single woman,)	NO. 2:13-cv-971
)	
Plaintiff,)	PLAINTIFF’S OPPOSITION TO
)	MOTION TO DISMISS OF CITY OF
v.)	LYNNWOOD, CHIEF STEVEN
)	JENSEN SGT. JEFF MASON, AND
MARC O’LEARY, a single man;)	DET. JERRY RITTGARN
CITY OF LYNNWOOD, a political)	
subdivision of the State of Washington;)	<u>Note on Motion Calendar:</u>
STEVEN J. JENSEN; JEFF A.)	Friday, August 9, 2013
MASON; JERRY RITTGARN;)	
COCOON HOUSE, a Washington)	ORAL ARGUMENT REQUESTED
Corporation; JANA HAMILTON; and)	
WAYNE NASH,)	
)	
Defendants.)	
)	

COMES NOW D.M., Plaintiff in the above styled and numbered cause and
opposes Defendants’ Motion to Dismiss, requests that it be denied, and states as follows:

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However, an understanding of the operative dates in this case is necessary to resolve the statute of limitations issues raised by Defendants' Motion to Dismiss. These operative dates are as follows:

2. August 14, 2008, the date Plaintiff was arrested by Defendants Sgt. Mason and Det. Rittgarn, taken to the Lynnwood Police Station, and forced to sign a statement that the rape had not happened and that she made up the story. Plaintiff was not advised that signing the statement was tantamount to confessing to the crime of filing a false police report in violation of Washington State Criminal Law RCW 9A-84-040. No advice was given to Plaintiff of her 5th Amendment right against self-incrimination, no advice given to Plaintiff of her 6th Amendment right to the assistance of counsel, and no Miranda warning given to her by the police officers. (Dkt. 3, Pgs. 35-57).

3. August 18, 2008, the date that Plaintiff went to the Lynnwood Police Station in the company of Jana Hamilton and Wayne Nash of Cocoon House to recant her August 14, statement that she had made up the story of being raped. Defendant Det.

1 Rittgarn in the presence of Lynnwood Police Officer Sgt. Coheim threatened Plaintiff
2 with jail if she failed a polygraph test and with loss of her housing benefits. (Dkt. 3,
3 Pg. 63, 69-74).

4
5 4. August 22, 2008, the date Plaintiff was allegedly arrested for the crime of
6 filing a false police report in violation of Washing State Criminal Law RCW 9A-84-040.
7 (Dkt. 3, Pg. 77).

8
9 5. August 27, 2008, the date that Plaintiff was charged with the crime of
10 filing a false police report in violation of Washington State Criminal Law RCW
11 9A-84-040. (Dkt. 3, Pg. 78).

12 6. September 25, 2008, the date that Plaintiff was arraigned in Lynnwood
13 Municipal Court and charged with the crime of filing a false police report in violation of
14 RCW 9A-84-040 and appointed a public defender. Plaintiff appeared in Lynnwood
15 Municipal Court with her public defender again on November 10, 2008. (Dkt. 3, Pgs.
16 79-81).

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18 7. March 12, 2009, the date Plaintiff entered into a pre-trial diversion
19 agreement. (Dkt. 3, Pg. 82).

20
21 8. April 7, 2010, the date that the charge against Plaintiff was dismissed
22 pursuant to the pre-trial diversion agreement. (Dkt. 3, Pg. 83).

1 9. February, 2011, the date that Defendant Marc O’Leary was arrested in
2 Lakewood, Colorado for sexual assault and considered a suspect in the rape of Plaintiff.
3 (Dkt. 3, Pg. 84).

4
5 10. March 16, 2011, the date that the City of Lynnwood reopened Plaintiff’s
6 criminal case and returned her bail. (Dkt. 3, Pg. 85).

7 11. March 17, 2011, the date the City of Lynnwood closed Plaintiff’s criminal
8 case again. (Dkt. 3, Pg. 85).

9
10 12. April 14, 2011, the date that the City of Lynnwood ordered DM’s criminal
11 record deleted from the Criminal Justice Agency files. (Dkt. 3, Pg. 86).

12 13. April 18, 2011, the date of the letter to Plaintiff from the Snohomish
13 County Prosecutor stating that Defendant Marc O’Leary had been charged with raping
14 her on August 11, 2008. (Dkt. 3, Pg. 87).

15 14. June 6, 2012, the date that Defendant Marc O’Leary pled guilty in
16 Snohomish County Superior Court to the crime of raping Plaintiff on August 11, 2008.
17 (Dkt. 3, Pg. 88).

18
19 **B. Plaintiff’s Section 1983 Claims Against the Individual Officers**
20 **Were Timely Filed and Should Not Be Dismissed**

21 Plaintiff’s tort claim was timely served on Defendants on October 31, 2012 and
22 Plaintiff’s complaint alleging violations of 42 USC 1983 was timely filed on June 6,
23 2013.
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DISMISS OF CITY OF LYNNWOOD, CHIEF
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28 DET. JERRY RITTGARN – 4
(2:13-cv-971)

H. RICHMOND FISHER
LAW OFFICES OF H. RICHMOND FISHER
105 MERCER ST., NO. 308
SEATTLE, WASHINGTON 98109
TELEPHONE (206) 282-7895
FAX (206) 285-2057

1 The Ninth Circuit treats claims under Section 1983 as personal injury claims
2 subject to the state personal injury statute of limitations, which is three years in the State
3 of Washington. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991);
4 RCW 4.16.080(2).
5

6 However, the date of “accrual” of the cause of action or “the determination of the
7 point at which the limitations period begins to run is governed solely by federal law.”
8 *Hoestery v. Cathedral City*, 945 F.2d 317, 329 (9th Cir. 1991). That date is “. . . when a
9 plaintiff knows or has reason to know of the injury which is the basis of his action.” *Id.*
10

11 Courts recognize the distinction between the date that an event takes place and the
12 date that injury to plaintiff from that event is discovered. They may be many years apart.
13 An example is an injury to a medical malpractice plaintiff caused by a medical implement
14 left in plaintiff’s body from an operation that occurred several years before the discovery
15 of the medical implement.
16

17 **1. The Date of Accrual of the Section 1983 Claims was June 6, 2012.**

18 In the case at bar events took place from August 14, 2008, the date Plaintiff was
19 arrested and taken to the Lynnwood Police Station through the termination of the City of
20 Lynnwood’s criminal proceedings against Plaintiff on April 14, 2011, the date that the
21 Lynnwood Municipal Court ordered that Plaintiff’s criminal record be deleted from the
22 criminal justice agency files.
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1 **2. The Injury.**

2 The injury caused by those events was not discovered until June 6, 2012, when
3 the rapist Defendant Marc O’Leary pled guilty in Snohomish County Superior Court to
4 the crime of raping DM back on August 11, 2008.
5

6 O’Leary’s plea established not only that Plaintiff had been injured by being
7 falsely charged and prosecuted for the crime of filing a false police report, but also
8 brought to light all the Defendants’ wrongful conduct against Plaintiff leading up to and
9 contributing to her being charge and prosecuted wrongly for filing a false police report.
10

11 O’Leary’s plea established Plaintiff’s injuries, including, but not limited to the
12 following:

13 a. Violation of her 4th Amendment rights by being wrongfully arrested
14 without probable cause by Defendants Sgt. Mason and Det. Rittgarn on August 14, 2008,
15 as police relied on the “inconsistencies” between (a) conjectures, without any objective
16 evidence, of an anonymous caller, plaintiff’s foster mother, Peggy F. Cunningham, and
17 Jordan Schweitzer that Plaintiff had made up the story of being raped and (b) the oral and
18 written statement of Plaintiff, supported by ample physical evidence collected by the
19 Lynnwood police that she had been raped , as the basis for picking her up and taking her
20 down to the Lynnwood Police Station for interrogation. (Dkt. 3, Pgs. 28-37).
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1 b. Defendants ignored all the evidence collected by the Lynnwood Police
2 Department on August 11, 2008 and collected by Providence Hospital Emergency Room
3 on August 11, 2008 that supported Plaintiff's claim of being raped. (Dkt. 3, Pgs. 26-29).

4
5 c. Violation of her 5th and 6th Amendment rights by Defendants Sgt. Mason
6 and Det. Rittgarn on August 14, 2008. (Dkt. 3, Pg. 35-59).

7 d. Failure by Defendants Sgt. Mason and Det. Rittgarn on August 14, 2008
8 to provide Miranda warnings to Plaintiff. (Dkt. 3, Pg. 35-59).

9
10 e. Defendant Sgt. Mason's statement to Cocoon House staff Wayne Nash
11 and Jana Hamilton that Plaintiff had lied about being raped. (Dkt. 3, Pg. 62).

12 f. Violation of plaintiff's 4th and 14th Amendment right to due process of
13 law by Defendant Det. Rittgarn's threat to Plaintiff to put her in jail if she failed a
14 polygraph test. (Dkt. 3, Pg. 102).

15 g. Violation of Plaintiff's 14th Amendment rights against deprivation of
16 substantive due process by Det. Rittgarn's threat to have her Cocoon House housing
17 benefits withdrawn. (Dkt. 3, Pg. 101).

18
19 **3. Other Possible Accrual Dates.**

20
21 Further, Plaintiff's tort claim was timely served on Defendants and Plaintiff's
22 complaint alleging violations of 42 USC 1983 was timely filed because they were served
23 and filed within three years of any conceivable date of notice of the potential involvement
24 of Defendant Marc O'Leary in this case.

1 a. They were filed within three years of April 18, 2011, the date of the letter
2 to Plaintiff from the Snohomish County Prosecutor advising her that Marc O'Leary had
3 been charged with the crime of raping her.

4
5 b. They were filed within three years of April 14, 2011, the date that the
6 Lynnwood Municipal Court ordered plaintiff's criminal record was expunged or deleted
7 from the criminal agency filed.

8 c. They were filed within three years of March 16, 2011, the date that the
9 City of Lynnwood had reopened Plaintiff's case and returned her bail of \$500.00 and
10 then closed her case again on March 17, 2011. This reopening of the case was ostensibly
11 because Marc O'Leary had been arrested in Lakewood, Colorado in February, 2011, with
12 evidence in his possession that linked him to the rape of DM.

13
14 d. They were filed within three years of March 17, 2011, the date that the
15 City of Lynnwood closed Plaintiff's case again on March 16, 2011 after reopening it to
16 return her bail.

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18 e. They were filed within three years of February, 2011, the date that Marc
19 O'Leary was arrested by police in Lakewood, Colorado for sexual assault and determined
20 to be a suspect in the rape of Plaintiff.

21
22 **C. Plaintiff's Section 1983 Claims Against the City of Lynnwood Were**
23 **Timely Filed and Should Not be Dismissed**

24 The Section 1983 claims against the City of Lynnwood were filed within three
25 years of the accrual date and the other possible accrual dates identified above: June 6,

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1 2012, April 18, 2011, April 14, 2011, March 17, 2011, March 16, 2011, and February,
2 2011. Defendants; statement that April 7, 2010 is the accrual date for statute of
3 limitations purposes is not correct. Even though the charge against Plaintiff was
4 dismissed on that date, the prosecution of Plaintiff did not end until April 14, 2011, when
5 the Lynnwood Municipal Court ordered her criminal record deleted from the criminal
6 justice agency files.

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8 Furthermore, the claim was filed within 3 years and 60 days of April 7, 2010, the
9 date that the charge was dismissed, and is, therefore, timely filed. See *Castro v.*
10 *Stanwood School District No. 401*, 151 Wash. 2nd 221, 226, 86 P.3d 1166, 1168,
11 (Supreme Court En Banc, 2004), holding that “60 days is added to the end of the
12 applicable statute of limitations,” when suing a government entity in a tort action.
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14 **D. The Facts Pled in Plaintiff’s First Amended Complaint Do State 1983 Claims**
15 **Against the City of Lynnwood Upon Which Relief Can Be Granted**

16 The facts pled in Plaintiff’s First Amended Complaint are taken from the
17 Lynnwood Police Department records and reports of their investigation of DM’s report of
18 being raped on August 11, 2008, sixty pages of which were attached to and made a part
19 of Plaintiff’s First Amended Complaint. The facts include the following: (a) Defendants
20 Sgt. Mason and Rittgarn both arrested Plaintiff on August 14, 2008 citing as reasons the
21 conjecture of an anonymous caller and two individuals, without objective evidence, that
22 she made up the story; (b) both police officers disregarded ample objective evidence
23 collected by them and other Lynnwood Police Officers that supported Plaintiff’s claim of
24

1 being raped; (c) both police officers violated Plaintiff's 5th Amendment rights, violated
2 her 6th Amendment rights, failed to give Plaintiff Miranda warnings, and extracted a
3 forced confession from her that she made up the story; (d) Defendant Sgt. Mason
4 telephone Cocoon House and told Defendant Wayne Nash that Plaintiff had lied about
5 being raped and had signed a statement saying so; (e) Defendant Rittgarn wrote a follow
6 on report in which he stated that he observed Plaintiff's wrists on August 11, 2008 and
7 saw no red marks on them, when those red marks were observed and noted an
8 photographed on August 11, 2008 by Lynnwood Police Officer Kelsey and Dr. Fields of
9 Providence Hospital; (f) on August 18, 2008 Defendant Det. Rittgarn in the presence of
10 Lynnwood Police Officer Sgt. Coheime, threatened Plaintiff with jail if she failed a
11 polygraph test and threatened to have her Cocoon House housing benefits removed when
12 she went back to the Lynnwood Police Station to recant her earlier written statement that
13 she had not been raped.
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17 These facts are sufficient to meet the legal standards for municipal liability set out
18 below.

19 1. The facts pled are sufficient to show municipal liability because "they
20 demonstrate that . . . the constitutional tort was the result of a longstanding practice or
21 custom which constitutes the standard operating procedure of the local government
22 entity." *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008);
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1 2. The facts also show that the police officers were not properly trained and
2 “the failure to train amounts of deliberate indifference to the rights of persons with whom
3 the officers come into contact.” *City of Canton v. Harris*, 489 U.S. 376, 389-91, 109 S.
4 Ct. 1197 (1989); and
5

6 3. The facts pled are also sufficient to establish Monell claims because they
7 constitute a continuing violation, “which may be established through a series of related
8 acts against one individual, or by a systematic policy or practice of discrimination.” (See
9 Defendants’ Motion to Dismiss, p. 9, l 19 – p. 10, l 1).
10

11 The facts pled are sufficient to withstand a FRCP 12(b)(6) Motion, which is not a
12 trial. It is early in this case, and the Rule 26 Disclosure has not yet occurred.

13 **E. Plaintiff’s Outrage Claim was Timely Filed and Should Not Be Dismissed**
14

15 This claim was filed within 3 years of the accrual date of June 6, 2012, and within
16 three years of the other possible accrual dates noted above: April 18, 2011, April 14,
17 2011, March 17, 2011, March 16, 2011, and February, 2011.

18 This claim was filed within 3 years of the date that the prosecution of Plaintiff
19 ended, April 14, 2011, the date that the Lynnwood Municipal Court ordered Plaintiff’s
20 criminal record deleted from the criminal justice agency files.
21

22 Furthermore, the claim was filed within 3 years and 60 days of April 7, 2010, the
23 date that the charge was dismissed, and is, therefore, timely filed. See *Castro v.*
24 *Stanwood School District No. 401*, 151 Wash. 2nd 221, 226, 86 P.3d 1166, 1168,
25

1 (Supreme Court En Banc, 2004), holding that “60 days is added to the end of the
2 applicable statute of limitations,” when suing a government entity in a tort action.

3 Defendants’ assertion that the Plaintiff should have known all the relevant facts
4 pertaining to the tort of outrage on March 12, 2009, when she entered into the pretrial
5 diversion agreement in Lynnwood Municipal Court is not correct.
6

7 **F. The State Law False Arrest and False Imprisonment Claims Are Timely Filed**
8 **and Should Not Be Dismissed**

9 Plaintiff’s state law claims for false arrest and false imprisonment were timely
10 filed within 2 years of the date that her injury was discovered, June 6, 2012, the date that
11 Defendant Marc O’Leary pled guilty in Snohomish County Superior Court to the crime
12 of raping DM on August 11, 2008.
13

14 **G. The State Law Defamation Claim is Timely Filed and Should Not Be Dismissed**

15 Plaintiff’s state law claim for defamation was timely filed within 2 years of the
16 date that her injury was discovered, June 6, 2012, the date that Defendant Marc O’Leary
17 pled guilty in Snohomish County Superior Court to the crime of raping DM on
18 August 11, 2008.
19

20 Sgt. Mason’s calling Cocoon House Case Manager Wayne Nash after the
21 August 14, 2008 interrogation of Plaintiff and telling him that Plaintiff had lied about
22 being raped was a defamatory act. Further, the charge and prosecution filing a false
23 police report set in motion acts by Cocoon House staff and others that were defamatory
24 and caused injuries to Plaintiff.
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H. RICHMOND FISHER
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1 **H. Plaintiff's Negligent Investigation Claim**

2 Defendants' legal citations are correct and Plaintiff withdraws this claim.

3 **I. Claims Against Chief Jensen in His Official Capacity**

4 Defendants' legal citations are correct and Plaintiff withdraws these claims.

5 **J. Defendants Are Not Prejudiced by Allowing All Claims to Go Forward**
6 **Because They Prepared and Maintained All the Lynnwood Police**
7 **Department Reports and Records that are the Basis of this Lawsuit**

8 Defendants are not surprised by the claims in this case, nor are they prejudiced by
9 allowing these claims to go forward. They have had all the reports and records that are
10 the basis of their liability in their possession since August, 2008.

11 **K. Plaintiff Looks to This Court for Justice**

12 Plaintiff, a teenager and participant in the state foster care system at the time, was
13 raped by Defendant Marc O'Leary, abused by the Lynnwood Police Department, to
14 which she turned for help, and abandoned by Cocoon House, her housing provider. She
15 looks to this Honorable Court for justice.

16 It is in the interest of justice to deny Defendants' Motion to Dismiss, so that all
17 her claims can go forward and be presented to the jury for determination.

1 DATED this 5th day of August, 2013.

2 s/ H. Richmond Fisher

3 H. Richmond Fisher, Esq., WSBA # 30946

4 Law Offices of H. Richmond Fisher

5 105 Mercer St., No. 308

6 Seattle, WA 98109

7 Telephone (206) 282-7895

8 Fax (206) 285-2057

9 E-mail: rich@winwinresolution.com

10 Attorneys for Plaintiff

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H. RICHMOND FISHER
LAW OFFICES OF H. RICHMOND FISHER
105 MERCER ST., NO. 308
SEATTLE, WASHINGTON 98109
TELEPHONE (206) 282-7895
FAX (206) 285-2057

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 15, 2013, I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of such
4 filing to the following:

5 Thomas P. Miller, WSBA #34473
6 CHRISTIE LAW GROUP, PLLC
7 2100 Westlake Avenue North, Suite 206
8 Seattle, WA 98109
9 Telephone: (206) 957-9669
10 Fax: (206) 352-7875
11 Email: tom@christielawgroup.com
12 Attorney for Defendants City of Lynnwood,
13 Jensen, Mason and Rittgarn

14 David J. Russell, WSBA #17289
15 Beth M. Strosky, WSBA #31036
16 KELLER ROHRBACK, LLP
17 1201 Third Avenue, Suite 3200
18 Seattle, WA 98101
19 Telephone: (206) 623-1900
20 Email: drussell@kellerrohrback.com
21 bstrosky@kellerrohrback.com
22 Attorneys for Cocoon House, Jana Hamilton, Wayne Nash

23 *s/ H. Richmond Fisher*
24 H. Richmond Fisher, Esq., WSBA # 30946
25 Law Offices of H. Richmond Fisher
26 105 Mercer St., No. 308
27 Seattle, WA 98109
28 Telephone (206) 282-7895
Fax (206) 285-2057
E-mail: rich@winwinresolution.com
Attorneys for Plaintiff

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LAW OFFICES OF H. RICHMOND FISHER
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SEATTLE, WASHINGTON 98109
TELEPHONE (206) 282-7895
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